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IN THE
COURT OF APPEALS OF INDIANA

CHRISTIAN MAVERICK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0609-CR-821
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol J. Orbison, Judge
Cause No. 49G17-0410-FD-182623

September 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Christian Maverick appeals the trial court's revocation of its acceptance of Maverick's guilty plea. We affirm.

Issue

The sole restated issue is whether Maverick may challenge in this appeal the trial court's revocation of its acceptance of Maverick's guilty plea.

Facts

The facts and procedural history of this case are highly unusual. By the end of 2004, Maverick was facing a variety of criminal charges filed under six different cause numbers. He also was facing probation revocation proceedings under two additional cause numbers. On January 19, 2005, Maverick appeared in court to plead guilty to three charges filed under the cause number ending in 182623: Class D felony criminal confinement, Class D felony residential entry, and Class D felony criminal mischief. There were a total of twelve charges filed under 182623. The written plea agreement declared that the State would "dismiss all remaining counts." App. p. 256. It also provided a precise term of incarceration for Maverick, thus removing sentencing from the trial court's discretion.

At the beginning of the January 19 hearing, the trial court, through a judge pro tempore, clarified that Maverick was before the court "on . . . eight files." Tr. p. 3. During the plea hearing, the deputy prosecutor stated, "Before the Court are eight matters involving this defendant and there are countless victims in this case." Id. at 13. Later, the deputy prosecutor said:

> I would like to make a record that, although other cases are pending today, that they are being resolved as a part of this plea agreement. I have noticed defense counsel that there are two cases that are in pre-screening involving another victim and Mr. Maverick that are not included in these agreements.

Id. at 14. The trial court accepted Maverick's guilty plea and sentenced him in accordance with the agreement. The trial court also stated, "essentially you will get credit for whatever days you have been in custody for Count One. I don't know how much time he has." Id. at 17. The deputy prosecutor responded, "One hundred and one." Id. She did not object to the trial court's award of 101 days of credit time to Maverick.

Contemporaneously with the filing of the plea agreement, the State filed motions to dismiss the remaining counts under cause number 182623, as well as the entirety of the other five new criminal cases. With respect to one of the pending probation violation cases, the chronological case summary ("CCS") states, "PROB VIOLATION CLOSED" on January 19. App. p. 552. The CCS for the other probation violation case does not have this notation.

On January 24, 2005, Maverick again appeared before the trial court. The regular trial judge now was presiding. The intended nature of this hearing is unclear, although it apparently was related to the two probation violation cases. At the beginning of the hearing, defense counsel said, "I think we are here on a State's motion." Tr. p. 25. The deputy prosecutor, who was also at the January 19 hearing, responded:

> It is actually not on anyone's motion. The issue is that the defendant pled guilty last week under Cause No. 04182623, to three D felonies be [sic] pled guilty to. It was a term of three years executed, well, six years executed, and two years probation. The plea did not call for any credit time. There

> was a pro tem sitting who applied his credit time which was at that time a hundred and one days to these cases, but there were two probation cases pending, and nothing was done with those cases. The intent of the parties is to apply that one hundred day credit time to those cases and have those two matters be resolved, which are the two matters that are before the Court today and that he get no credit time on the 04182623.

Id. Defense counsel responded that it was her understanding that the plea agreement also was intended to resolve the probation violation cases. When the trial court asked the deputy prosecutor if that was her understanding of the plea, she said, "No, Your Honor. Give me a break." Id. at 26. At no time during the hearing did defense counsel request that the guilty plea be withdrawn.

Towards the end of the hearing, the following discussion took place:

> THE COURT: My question to you is: the plea agreement contains only mention of one cause number. If this plea agreement were to affect other cause numbers, that should be included in the plea agreement.
>
> [DEFENSE COUNSEL]: But in talking to the State, Judge, I was told that all the other cases would be dismissed.
>
> THE COURT: I have no idea what was said between the parties and I accept what both parties say, as a matter of fact. So I will have to, absent an agreement on this issue, I am going to have to allow the defendant to withdraw his guilt [sic] plea and set the matter for trial. And rescind the order accepting the plea agreement.
>
> [DEFENSE COUNSEL]: Even though he has already pled guilty to the one cause number?
>
> THE COURT: You are telling me that basically the sentencing is invalid because it does not respect with [sic] was agreed upon by the parties. I am not going to sit here and enter into what you say was the agreement and what the State

> says is the agreement. . . . So, showing the order entered on January 19, 2005, under which the Court accepted the plea agreement, that order is rescinded and all matters set for trial.

Id. at 27-28.

Immediately after the trial court rescinded Maverick's guilty plea, he wrote two threatening letters—one to his girlfriend who was the victim in many of these cases and one to his girlfriend's mother—demanding that the girlfriend recant her statements against him or not appear in court to testify. Because of these letters, the State filed two new informations against Maverick accusing him of Class D felony attempted obstruction of justice.

On February 16, 2005, Maverick appeared in court to plead guilty under cause number 182623 to Class D felony criminal confinement and Class D felony battery and to the two new Class D felony attempted obstruction of justice charges. The plea also provided that the State would not refile charges under two of the cause numbers dismissed on January 19, but reserved the right to do so under two of the other cause numbers dismissed on that date, which numbers ended in 201297 and 177184. At that time, the trial court took the plea under advisement and scheduled a further hearing for March 2, 2005.

Between February 16 and March 2, the State filed a new charging information, under a cause number ending in 031992, that contained seventeen counts: two counts of Class C felony stalking, one count of Class D felony stalking, two counts of Class D felony confinement, four counts of Class D felony intimidation, one count of Class D felony attempted obstruction of justice, one count of Class D felony theft, one count of

Class A misdemeanor battery, and five counts of Class A misdemeanor invasion of privacy. It appears the facts underlying these charges essentially were the same as those underlying the previously dismissed 201297 and 177184 cases, which the State reserved the right to pursue under the second plea agreement.[1] However, there were only six total counts contained in those dismissed causes: two counts of Class D felony invasion of privacy, two counts of Class A misdemeanor invasion of privacy, one count of Class A misdemeanor domestic battery, and one count of Class A misdemeanor battery.

Maverick appeared in court on March 2, 2005, at which time the trial court accepted his guilty plea for the 182623 case and the obstruction of justice cases and proceeded to sentence him. Maverick did not attempt to withdraw from this guilty plea. Additionally, no mention was made of the State's new charging information it filed under cause number 031992.

There is no further mention in the record of the first and second guilty pleas until April 6, 2006, at which time Maverick filed a "Motion for Enforcement of Original Plea Agreement," under the 182623 cause number. App. p. 307. Maverick has never filed a post-conviction relief petition seeking to set aside his second guilty plea, nor has he filed a motion to dismiss any of the charges under the 031992 cause number.

On July 3, 2006, the trial court entered an order denying Maverick's motion for enforcement of the first plea agreement. On August 3, 2006, Maverick filed a "Petition to Certify an Order for an Interlocutory Appeal and to Stay Proceedings Pending the

[1] The victim in the 031992 cases was the same for all counts, but different from the victim in the 182623 cases to which Maverick pled guilty.

Outcome." App. p. 88. The petition concludes by requesting certification of "the Court's order issued on _____ for an interlocutory appeal . . . ." Id. at 96 (blank in original). That same day, the trial court issued an order specifically certifying its January 24, 2005 order, rescinding the first plea agreement, for interlocutory appeal. However, it denied Maverick's request to stay further proceedings in the 031992 case pending outcome of the appeal.

Maverick failed to seek permission from this court to pursue an interlocutory appeal within thirty days of the trial court's interlocutory certification order, as required by Indiana Appellate Rule 14(B)(2)(a). On September 19, 2006, the trial court issued another order certifying its January 24, 2005 order for interlocutory appeal, and Maverick timely sought permission from this court to pursue an interlocutory appeal.[2] On September 29, 2006, the motions panel of this court denied Maverick permission to pursue an interlocutory appeal. However, on December 5, 2006, upon Maverick's motion the motions panel reconsidered and granted such permission. Additionally, we stayed further proceedings in the trial court in cause number 031992 until resolution of this appeal.[3]

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[2] The parties seem to act as if the trial court certified its July 3, 2006 ruling for interlocutory appeal. It did not, and Maverick's request for interlocutory certification failed to specify which order he wanted certified. Certification of the January 24, 2005 order would fall outside the thirty-day time limit for seeking discretionary certification of interlocutory orders for appeal under Appellate Rule 14(B)(1)(a). The State does not seek dismissal of Maverick's appeal on this basis, however.

[3] Maverick's trial in cause number 031992 was scheduled to begin on December 12, 2006.

Analysis

It is axiomatic that although a trial court has discretion to accept or reject a plea agreement, once it accepts an agreement it is bound by all the terms of the agreement that are within its legal power to control. Reffett v. State, 571 N.E.2d 1227, 1230 (Ind. 1991). Such acceptance generally is not revocable. See id. (holding trial court lacked authority to revoke prior acceptance of plea agreement despite its failure to comply with statutory requirement to review a presentence report before accepting the plea). Additionally, Reffett held that the mere fact a defendant enters into a second guilty plea after a trial court revokes acceptance of a first guilty plea does not necessarily waive the defendant's right to seek enforcement of the first guilty plea's terms. See id.

The State contends that the trial court rescinded its acceptance of the plea agreement because it could not discern the intent of the parties from the written plea agreement. However, it has been held that where the terms of a plea agreement are made known to the trial court on the record and the trial court accepts the plea, then the trial court must enforce the plea agreement's terms, even if they were not reduced to writing. See Shepperson v. State, 800 N.E.2d 658, 660 (Ind. Ct. App. 2003). Additionally, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 499 (1971).

Unlike the court in Reffett, however, we do not believe we are in a position to address the merits of Maverick's claims regarding rescission of his first guilty plea. In Reffett, the defendant was facing two charges under one cause number. He pled guilty to

one of the offenses in that case, with the sentence to be served concurrent with a sentence imposed in a different case in a different county. After accepting the plea agreement, the trial court reviewed the defendant's presentence report and revoked the acceptance. The defendant pled guilty again to the same charge, only this time his sentence would be served consecutive to the sentence from the other county. Sometime after being convicted and sentenced under the second plea agreement, the defendant filed a motion to correct sentence, seeking to be sentenced in accordance with the first plea agreement, i.e. that his sentence be served concurrent with the sentence from the other county.

Our supreme court in Reffett held that it was appropriate for the defendant to seek enforcement of the first plea agreement's sentencing provision through a motion to correct sentence, rather than a petition for post-conviction relief. See id. at 1228-29. Although a post-conviction proceeding would have been preferable, the court stated, "this Court tries to encourage conservation of judicial time and energy while at the same time affording speedy and efficient justice to those convicted of a crime." Id. at 1229. "If a sentence that violates express statutory authority is facially erroneous, a sentence that violates the express terms of a plea agreement is also facially erroneous, and may be attacked by a motion to correct erroneous sentence." Id.

The issues in Maverick's case are much more complex than whether the sentence he received under the second plea agreement can be substituted with the sentence

provided by first plea agreement, as was the case in Reffett.[4] The first plea agreement is completely different from the second plea agreement, and cannot be enforced without entirely nullifying the second plea agreement. Maverick pled guilty to different charges in the second plea agreement than in the first, including one different charge under cause number 182623 and two entirely different charges that had not even been filed at the time of the first plea. Maverick pled guilty to one charge under 182623—Class D felony criminal confinement—in both the first and second plea agreements; obviously, two convictions for the same offense could not stand. Also, the first plea agreement arguably provided for dismissal of all pending cases against Maverick, while in the second agreement, the State reserved the right to pursue the charges that eventually formed the basis of cause number 031992 and expressly did not resolve the probation violation cases.

What all this means for the purpose of Maverick's appeal is that before he can seek to enforce the first plea agreement, he must first set aside the second plea agreement. We conclude that in order to do so, Maverick must file a petition for post-conviction relief challenging the convictions entered under the second plea agreement. Our supreme court has been quite clear that the validity of a guilty plea must be challenged via a post-conviction proceeding, and no other way. See, e.g., Jones v. State, 675 N.E.2d 1084,

[4] In any event, Reffett has been overruled to the extent it allowed the defendant to seek enforcement of the first plea agreement through a motion to correct sentence, as opposed to a petition for post-conviction relief. See Robinson v. State, 805 N.E.2d 783, 787 (Ind. 2004). We believe it is clear, post-Robinson, that a defendant seeking to enforce a first plea agreement after pleading guilty under a second agreement must do so through a post-conviction relief petition.

1090 (Ind. 1996).[5] Grounds for setting aside a guilty plea on post-conviction relief include that the plea was involuntary, or was procured through ineffective assistance of counsel. See Willoughby v. State, 792 N.E.2d 560, 563 (Ind. Ct. App. 2003), trans. denied. Additionally, "pleas entered after coercion, judicial or otherwise, will be set aside. Defendants who can prove that they were actually misled by the judge, the prosecutor, or defense counsel about the choices before them will present colorable claims for relief." White v. State, 497 N.E.2d 893, 905-06 (Ind. 1986). We hold that a post-conviction proceeding is the proper venue in which to (a) assess the validity of the trial court's revocation of acceptance of Maverick's first plea agreement and (b) whether such revocation, if improper, rendered Maverick's second plea invalid as the result of involuntariness or if trial counsel was ineffective for advising Maverick to enter into the second plea rather than challenging the trial court's rescission of the first plea.

Maverick also argues, separate and distinct from the rescission of the first guilty plea, that the State should not have been allowed to repackage the dismissed cause numbers 201297 and 177184. These two cause numbers combined charged Maverick with two class D felonies and three Class A misdemeanors. Newly-filed cause number 031992, by contrast, charged Maverick with two Class C felonies, nine Class D felonies, and six Class A misdemeanors. Maverick requests on appeal that those additional charges filed under cause number 031992 that had not been previously filed be dismissed. Although the State is not absolutely prohibited from dismissing and re-filing a case, it

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[5] By contrast, sentencing issues, where the plea left sentencing to the trial court's discretion, must be pursued on direct appeal. See Collins v. State, 817 N.E.2d 230, 233 (Ind. 2004).

may not do so if it would prejudice the substantial rights of the defendant. Davenport v. State, 689 N.E.2d 1226, 1229 (Ind. 1997).

We see no indication in the record that Maverick ever filed with the trial court a motion to dismiss these charges under Indiana Code Section 35-34-1-4. Failure to file a motion to dismiss challenging an information or indictment waives any claim of error in the information or indictment. See Zordani v. State, 175 Ind. App. 297, 298-99, 371 N.E.2d 396, 398 (1978). Additionally, as a general rule a party may not present an argument or issue on appeal unless the party raised that argument or issue before the trial court. Washington v. State, 808 N.E.2d 617, 625 (Ind. 2004). Finally, the only order certified for interlocutory review in this case was the trial court's rescission of the first guilty plea. We cannot entertain Maverick's request to order dismissal of any part of cause number 031992.[6]

Conclusion

Maverick is required to seek the vacation of his second guilty plea through a post-conviction relief petition before he can seek the enforcement of his first guilty plea. Thus, we affirm the trial court's revocation of its acceptance of the first guilty plea, which was the only order in this case that was certified for interlocutory appeal.

Affirmed.

KIRSCH, J., and ROBB, J., concur.

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[6] We note that the motions panel's eventual acceptance of this case for interlocutory appeal did not constitute a guarantee that we would decide the merits of Maverick's arguments. See Davis v. State, 771 N.E.2d 647, 649 (Ind. 2002) (holding that rulings of this court's motions panel are not final and binding).